TO BE RECOVERED

(2)

June 7, 2007

No. 06-1193

In The
Supreme Court of the United States

Christopher M. Gambla,

Petitioner

v.

Kimberly K. Woodson,
Respondent.

On Petition For A Writ Of Certiorari

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Illinois Appellate Court erred in holding that the racial and cultural heritage of a mother and father and their biracial child, Kira, was an appropriate factor to consider, among many other factors, when applying the "best interest of the child" standard to determine the proper custodial parent?

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STATEMENT OF THE CASE

This brief is filed in response to this Court's request for a response to the petition for a writ of certiorari. Because the decision of the Illinois Appellate Court does not conflict with this Court's decision in *Palmore v. Sidoti*, 466 U.S. 429 (1984), and because there is no split among the state courts of last resort as to whether the relative racial and cultural characteristics of a child and her parents may be considered as merely a factor among many in a custody determination, the petition should be denied.

On May 13, 2003, Christopher Gambla filed for divorce from Kimberly Woodson after one year of marriage. Ms. Woodson had one child from a previous marriage—a six-year-old son named Che Woodson. During their marriage, Gambla and Woodson together had another child, Kira Marie. Both parents sought sole custody of Kira during divorce proceedings.

At trial, two experts recommended that Gambla be awarded sole custody of Kira, at least in part on the basis that Kimberly had (at the time) petitioned for removal of Kira to her home state of North Carolina. That petition for removal was eventually withdrawn when Woodson determined instead to stay in Illinois to raise both of her children.

Family members also testified at trial. Gambla's mother, Arlene, testified that she helped care for Kira when her son was at work. She remarked that Kira would "often talk about" her mother when she (Arlene) and Kira were together. Kimberly's sister, Linda, testified that Kimberly breast-fed Kira, bathed her, prepared her for naps and bedtime, and further noted that she was "patient" with her daughter. As for Kira's half-brother, Che, Arlene noted: "Che and Kira have a good

relationship. Kira and Che are very glad when they get to see each other. Kira and Che like to play hide and seek . . . [and they] sing and dance together. . . . Kira always wants to be near Che and frequently asks for 'Che Che.'" *Gambla v. Woodson*, 367 Ill.App.3d at 455. A social worker who testified confirmed that "Che has a loving relationship with Kira." *Id.*

Gambla and Woodson both gave testimony as to the nature of their relationships with Kira and their relative fitness as parents. Gambla testified that his wife appeared to become depressed after Kira's birth and that she also had a different parenting style than he (particularly in the area of health care). While Gambla was a proponent of traditional medicine, Woodson, a licensed nurse, advocated an alternative medicine approach. According to Gambla, this differential resulted in clashes over, *inter alia*, decisions as to whether to feed Kira meat and give her fluorinated water.

Woodson agreed with Gambla that, after Kira's birth, she suffered from postpartum depression, and testified that she in fact sought counseling during that period of time. She also agreed that her approach to Kira's health care was different from that of Gambla, and complained that, as a result, Gambla would "frequently ma[ke] medical appointments for Kira at times that he knew [Woodson] would not be available" and further that he changed Kira's doctor without consulting her. *Gambla v. Woodson*, 367 Ill.App.3d at 451. As far as her own parenting style, Woodson "testified that she want[ed] Kira to be exposed to different cultures, languages, religions, and ways of thinking." *Id.* Woodson, who obtained a bachelor of arts degree in biology and African-American studies from Rutgers, further stated that she could "teach Kira a lot about African-American culture, including African-American expressions, the African-American way of moving, African-American

celebrations, and African-American family relationships." *Id.* To that end, according to Woodson, she took "Kira to [her African-American dance] class on occasion," where "Kira enjoy[ed] dancing with the women and children [in the] class." *Id.* Finally, Woodson testified that Kira "has a close relationship" with Che, that they play together, practice Tae Kwan Do together, and that Kira turns the pages for Che when he practices the trumpet. *Id.* at 452.

After hearing this and other testimony, the trial judge considered the various factors set forth under Illinois statute—namely, the wishes of the parents, the wishes of the child, the interrelationship of the child with her parents and siblings, the child's adjustment to home and school (if any), the mental and physical health of child and parents, the threat of physical violence or abuse (if any), and the willingness and ability of each party to facilitate and encourage a relationship between the child and the other party. The court noted, *inter alia*, that Kira appeared to love both of her parents and to be "happy spending time with each of them," and furthermore that Kira had a "loving relationship with her brother Che." Tr. Court order, Pet. Appendix p. 66a. As to the parents' differing parenting "outlooks," the court noted that "neither . . . approach [was] wrong." *Id.* As for the parties' willingness to encourage a relationship between Kira and the other parent, the court considered the expert testimony that Gambla appeared more apt to do so. However, finding that their conclusions were based largely on the pendency of a petition to remove Kira to North Carolina, the trial court determined that given the subsequent withdrawal of this petition, these conclusions carried less weight.

Concluding that both Gambla and Woodson were "loving, caring and able parents" who simply "c[ould]n't agree on what to do with their daughter," *id.*, the court

went on to consider an additional factor that had been raised by Woodson and noted by various experts—namely that Kira was a biracial child whose father was Caucasian and mother was African-American. As to this issue, after hearing Woodson's testimony as to her cultural and educational hopes for her daughter, that she would "provide Kira with a breadth of cultural knowledge and experiences that [Gambla] w[ould] not be able to do." Tr. Court order, Pet Appendix p. 69a. Additionally, the court noted, that both parties were "well intentioned when they say that they w[ould] attempt to expose Kira to all aspects of her ethnic heritage" but that "there are some obvious limitations imposed upon both." *Id.* Finally, the court determined to award custody to Woodson "based on her slightly better ability to provide for the emotional needs of the child which may be occasioned by her special circumstances . . .". *Id.*

On appeal, in a 2-1 decision, the Illinois Appellate Court affirmed the award of custody to Ms. Woodson. In so doing, the majority noted that Petitioner had conceded at oral argument that "race may be considered" in Illinois child custody decisions. 367 Ill.App.3d 441, 466, 853 N.E.2d 847, 868 The dissent, meanwhile, focused mainly on state-law evidentiary issues concerning the admissibility of weight attributed to certain expert witness testimony. The Illinois Supreme Court denied Petitioner's petition for leave to appeal on November 29, 2006.

On February 27, 2007, Gambla filed a petition for a writ of certiorari, and Ms. Woodson now responds.

REASONS FOR DENYING THE PETITION

I. THE ILLINOIS APPELLATE COURT DECISION DOES NOT CONFLICT WITH *PALMORE*

Petitioner first argues that this case warrants review because the Appellate Court's decision conflicts with this Court's opinion in *Palmore v. Sidoti*, 466 U.S. 429 (1984). However, *Palmore* presented starkly different facts than those at issue here and *Palmore*'s custody determination was based *solely* on race (rather than considering race among many other factors). Furthermore, the thrust of *Palmore* was to stamp out improper racial stereotyping that was simply not present here. Accordingly, the Illinois Appellate Court decision does not conflict with *Palmore* and *Palmore* provides no basis for a grant of certiorari.

Palmore involved a custody dispute between Caucasian parents of a Caucasian child. There, the father, who had originally been denied custody, sought modification of the prior judgment on the basis of changed circumstances—namely, that his ex-wife intended to marry an African-American man. Concluding merely on the basis of the races of the adults and child involved that this union would "subject[] [the child] to environmental pressures not of choice" (namely, that the white child would now be living with a black step-parent) the court removed the child from the mother's custody and place her with her father. *Palmore*, 466 U.S. at 431. In so doing, the court purported (again, solely on the basis of skin color) to be protecting the child from "the social stigmatization" that it reasoned "was sure to come." *Id.*

In its review, the Supreme Court noted that the trial court in *Palmore* had "made *no effort* to place its

holding on any ground other than [the] race" of the step-father and its perceived ill-effects on the child. *Id.* at 432. While the Supreme Court acknowledged that racist tendencies may persist, it concluded that "the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother." *Id.* Thus, the *Palmore* court declared unconstitutional a state court's child custody decision based solely on race (when no other parenting factors are considered).

The nuanced decision of the trial judge in this case is distinguishable from the analysis in *Palmore* and, indeed, did not run afoul of its holding. Here, the trial court painstakingly considered each and every factor set out by the applicable Illinois statute—the child's interest in living with each parent, the parents' willingness to foster a relationship with the other parent, their child's relationship with her brother and other relatives, etc. Only after it weighed these statutory factors did the trial court proceed to consider Kira's racial and cultural needs as one additional step in its analysis.

The importance of the sequence of the trial court's analysis cannot be overstated: the court's measured approach reveals that racial or cultural considerations are a factor of *last resort* rather than first opportunity to be reached only after other statutory factors are deemed to be roughly equal. As a matter of pure probability, with eight statutory factors to consider, the likelihood of race coming into play repeatedly (at least as the Illinois court considered it here) appears small. Certainly, the court's reasoned approach takes this case well outside the realm of any *Palmore* problems—for the *Palmore* rule was that race (and, more to the point, the perceived potential for racial discrimination on the basis of a custodial parent's subsequent biracial marriage) failed strict scrutiny where it was the *sole* factor driving the custody decision.

Nor is this case a particularly good vehicle for deciding the role of race in custody cases. As the Appellate Court observed, Petitioner conceded at trial that "race may be considered." . 367 Ill.App.3d 441, 466, 853 N.E.2d 847, 868. And if race may be considered, then it may on occasion be the tipping point and that is all that this case is about.

Palmore is further distinguishable insofar as base racial stereotyping—namely, that any Caucasian child who lives with a Caucasian mother and African-American stepfather will suffer resulting "social stigmatization"—was permitted to control the custody decision. The logic applied by the trial court in *Palmore* was essentially as follows: (1) the child is white; (2) the child's (white) mother is marrying a black man; (3) the child is thus likely to suffer some hardship on account of racial prejudice; (4) therefore, it is in her best interest to be removed to her father. Nowhere in the *Palmore* decision is there any mention of any personal testimony as to *actual* discrimination experienced by the child or her parents. *Cf. Holt v. Chenault*, 722 S.W.2d 897 (Ky. 1987) (noting that, while the fact of an interracial marriage may not be considered to support a child custody modification, a child's reactions to and rebellion against such a circumstance is a proper factor for consideration). By all accounts, the trial court's decision represented mere conjecture based solely on the color of the new step-father's skin. As the Court noted in *Palmore*, such a classification "is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." *Id.*

In complete contrast, the trial judge in this case made his custody decision based on detailed portraits of each parent created over the course of a 15-day trial establishing the parents' relative fitness—in all areas including racial and cultural concerns. The record

contained the observations and opinions of Dr. Anita Thomas, a psychologist specializing in multicultural counseling and family therapy. 367 Ill.App.3d at 452. She prepared a dissertation on the racial socialization of African-American families and a thesis on the emotional reactions of children in step families. She taught numerous classes on subjects including multicultural counseling, child development, human development, and professional identity. *Id.* Dr. Thomas opined that Kira would obtain a better sense of her racial identity from living with Ms. Woodson and that it was vitally important that Kira be socialized in the African-American culture. 367 Ill.App.3d at 454 and 462.

While the court obviously considered racial and cultural factors when concluding that Respondent would "be able . . . to provide Kira with a breadth of cultural knowledge and experience" that Petitioner would not, and that Petitioner was better suited to address the "emotional needs . . . which may be occasioned" by her biracial status, he did not merely assume as much based on the color of Respondent's skin. Instead, and in important contrast to *Palmore*, Respondent's "person" dictated the ultimate determination of the trial judge, as he was able to rely on the testimony of Respondent herself to determine her relative fitness to help shape Kira's cultural identity. Indeed, Respondent testified extensively on this point, noting, among other things, that she hoped to "teach Kira a lot about African-American culture, including African-American expressions, the African-American way of moving, African-American celebrations, and African-American family relationships," *Id.* at 468. The record further reflected that Respondent, an African-American studies major in college, also took Kira to cultural activities including an African-American dance class.

The lower court in this case considered racial and cultural factors among many others—and even then, as a

last resort—and furthermore considered the racial dimension in light of *actual* personal traits of the two parents (the "person" rather than the race). The state court's decision—which, as a state appellate court opinion, in any event has limited reach—is thus distinguishable from *Palmore* in a number of respects, and is not in conflict with existing Supreme Court precedent. For all of these reasons, it does not warrant review by this Court.

II. THERE IS NO SPLIT AMONG THE STATE COURTS OF LAST RESORT ON THE ISSUE OF WHETHER THE RACIAL AND CULTURAL BACKGROUNDS OF THE NATURAL PARENTS AND THEIR CHILD MAY BE CONSIDERED AS ONE FACTOR AMONG MANY IN RENDERING A "BEST INTERESTS OF THE CHILD" CUSTODY DETERMINATION

There is no split among the state courts of last resort on the question presented here—namely, whether in rendering a child custody decision a court may consider the racial and cultural backgrounds of the parents and child as one factor in its "best interest of the child" analysis. Petitioner points to an ostensible split between the Kentucky and Tennessee Supreme Courts, on the one hand, and the South Dakota and Nebraska Supreme Courts, on the other, as supporting his position that this case is worthy of this Court's review. In reality, however, these cases are not truly "split" but, rather, distinguishable for similar reasons that the instant case is distinguishable from *Palmore*.

Holt v. Chenault, 722 S.W.2d 897 (Ky.S.Ct. 1987) and *Parker v. Parker*, 986 S.W.2d 557 (Tn. S.Ct. 1999), the Kentucky and Tennessee Supreme Court cases

that Petitioner asserts "prohibit" any consideration of race in child custody determinations, are virtually indistinguishable from *Palmore* and thus constitute a direct application of that precedent. Similar to *Palmore*, in *Holt*, the non-custodial father sought to obtain custody based on a single changed circumstance—the mother's subsequent marriage to a man of a different race. The trial court granted the request for modification on two apparent bases: (1) the mother's interracial marriage; and (2) the child's resulting discontent and demonstrated attempts to run away on account of resulting teasing she had endured. The *Holt* court concluded that, while the child's reactions and behavior were appropriate to consider (even if they touched on matters of race), the "impact of [a] biracial marriage [wa]s an *inappropriate* basis for modification" of a child custody decree in light of *Palmore*. *Holt*, 722 S.W.2d at 899 (emphasis added). Accordingly, the court remanded for a determination of custody apart from general concerns about the interracial marriage (though the child's own reactions would be appropriate for consideration).

Parker similarly addressed whether the effects of an interracial relationship may be a basis for awarding custody. In *Parker*, the father sought custody of the child, in part, on the basis that his wife was in a relationship with an African-American man (there was testimony in the record that such relationships could be harmful to children). The trial court granted custody to the father, but stated that its holding was based on factors *other* than the racial element. On appeal, the *Parker* court "accepted the trial court's statement that race did not play a part in its decision-making in awarding custody to the father" and, accordingly, affirmed the custody grant to the father. Nonetheless, the court reiterated *Palmore*'s holding that "the alleged harmful effects of an interracial relationship on a minor child" would be an inappropriate basis for granting or denying custody.

Holt and *Parker* are merely clones of *Palmore*—direct applications of the *Palmore* rule that a parent's interracial marriage (or relationship) may not be considered as the basis for removing or denying custody of the child to that parent. And, while Petitioner cites *Jones v. Jones*, 542 N.W.2d 119 (S.D. S.Ct. 1996) and *Brown v. Brown*, 621 N.W.2d 70 (Ne. S.Ct. 2000) as arriving at contrary holdings, upon review, there is no true conflict, for these two cases are distinguishable from *Holt* and *Parker* both in fact and law (and, indeed, for many of the same reasons that the instant case is distinguishable from *Palmore*).

Similar to the instant case, *Jones* involved the dissolution of a biracial marriage—a Caucasian woman to a Native-American man. In granting the father primary physical custody of the children, the trial court considered, *inter alia*, the father's stated intention to expose his children to and educate his children in the ways of their Native-American heritage. Noting that the trial court's decision to grant the father custody was "not blind" to the issues of race, the South Dakota Supreme Court nonetheless affirmed, stating that it is "proper for a trial court, when determining the best interests of a child in the context of a custody dispute between parents, to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it." *Id.* at 123. The court then noted that it was "satisfied" that the court had not "*impermissibly* award[ed] custody on the basis of race." *Id.* (emphasis added).

Brown v. Brown is distinguishable from the cases of *Holt* and *Parker* inasmuch as *Brown* considered race in the context of the desirability of moving a minority child to a more diverse city (again, a non-*Palmore* context). In *Brown*, the mother argued that she should be allowed to remove her children from Lincoln, Nebraska, to New

York City, in part, because New York offers more racial diversity than Lincoln and her children were "minorities." When considering this issue *de novo* on appeal, the Supreme Court concluded that, while "a child's racial identity is one factor among several that may be considered in making custody determinations," *Brown*, 621 N.W.2d at 83, and the relative racial diversity of the minority child's proposed domicile was an "appropriate consideration," the evidence in the record did not support that it was a significant factor in this case. The Nebraska Supreme Court noted that there was no actual evidence that the children had in fact suffered any prejudice in Nebraska—nor that race relations were any better in New York. Accordingly, New York's racial diversity was not considered a factor that would improve the living conditions of the children in that case. In any event, while *Brown* clearly stands for the proposition that race (and its attendant factors—cultural considerations, diversity, etc.) may be considered as one factor in child custody determinations, it is similarly distinguishable from the *Palmore*-type cases and does not constitute a contrary authority.

CONCLUSION

The lower courts in this case did not decide the custody issue solely on the basis of race in violation of *Palmore*. Nor are the state courts of last resort split in answering the precise question presented here—namely, whether racial and cultural characteristics of the natural parents of a child (and their related willingness or ability to shape that child's racial identity) may be considered as one element of many in a child custody determination. Moreover, because the narrower question of whether race can be considered at all was conceded away by the Petitioner in the trial court below this Court should deny review of this case.